

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Federal-State Joint Board on Universal Service)	CC Docket 96-45
)	
NPCR, INC. d/b/a NEXTEL PARTNERS)	DA 04-998
)	
Supplement to Petition for Designation as an)	
Eligible Telecommunications Carrier)	
in the State of Alabama)	
_____)	

**NEXTEL PARTNERS' EX PARTE COMMENTS
IN RESPONSE TO REPLY COMMENTS OF THE
ALABAMA RURAL LOCAL EXCHANGE CARRIERS**

NPCR, Inc. d/b/a Nextel Partners ("Nextel Partners"), by its counsel, hereby submits its "Ex Parte Comments" in response to the "Reply Comments" filed on May 14, 2004 by the Alabama Rural Local Exchange Carriers ("ARLEC") in the above-captioned proceeding, which concerns Nextel Partners' Petition for Designation as an Eligible Telecommunications Carrier ("ETC") in the State of Alabama¹ as recently supplemented in compliance with the requirements of the Commission's *Virginia Cellular Order*.²

ARLEC identifies itself as a group of 26 rural telephone companies ("RTCs") in Alabama.³ Only *eleven* of ARLEC's members – less than half – occupy study areas in

¹Nextel Partners' Petition for the Designation as an Eligible Telecommunications Carrier in the State of Alabama (hereinafter, the "Petition") was filed on April 4, 2003 in Commission Docket No. 96-45.

² *In the Matter of Federal-State Joint Board on Universal Service: Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*, 19 FCC Rcd 1563 (2004) ("*Virginia Cellular Order*"). In *Virginia Cellular*, the Commission set forth several requirements for ETC designation in rural areas, and stated that "[t]he framework enunciated in this Order shall apply to all ETC designations for rural areas pending further action by the Commission." *Virginia Cellular Order* at ¶ 4.

³ See ARLEC Reply Comments at 1 n.1.

which Nextel Partners seeks ETC designation.⁴ Of these eleven, *six* are either operated by TDS Telecom (“TDS”), or by Frontier.⁵ TDS and Frontier have already commented on Nextel Partners’ Supplements filed in Docket 96-45 in accordance with the Public Notice. To the extent that ARLEC’s “Reply Comments” merely reiterate comments already made by closely-related or identical entities, they should be viewed as late-filed *initial* comments and are not entitled to be considered.⁶ Even if considered, however, ARLEC’s Reply Comments are without merit, and the Commission should move expeditiously to grant Nextel Partners’ Petition for ETC status in Alabama.

A. There is No Justification for Holding Nextel Partners’ Petition in Abeyance Pending Resolution of the Issues from the Joint Board’s *Recommended Decision*

ARLEC reiterates TDS’ comment that Nextel Partners’ Petition should be held in abeyance until the Commission has resolved all of the “outstanding ETC designation issues” from the Joint Board’s *Recommended Decision* in the Portability Proceeding.⁷ In particular, ARLEC claims that the Commission should not grant Nextel Partners’ Petition without first establishing a framework to assess the “overall effect” on the Universal Service Fund (“USF”) of granting multiple competitive ETCs.⁸ ARLEC’s comments,

⁴ Nextel Partners is seeking designation only in the RTC study areas of ARLEC members Butler Telco, Castleberry Telco, Graceba Total Comm., Hayneville Telco, Frontier-Lamar, Millry Telco, Mon-Cre Tel. Coop, Frontier-Alabama, Moundville Telco, Frontier-South, and Union Springs Telco.

⁵ Butler Telco, Oakman Telco, Peoples Telco, Frontier-Lamar, Frontier-Alabama and Frontier-South.

⁶ ARLEC’s Reply Comments also contain some argumentation and factual representations that are newly-raised, and not responsive to any comments made in this proceeding, and to this extent they are not proper reply comments, and need not be considered.

⁷ ARLEC Reply Comments at 2.

⁸ *Id.* at 3.

which are no more than restatements of comments made on May 7, 2004 by TDS in its Comments,⁹ are misguided.

As Nextel Partners already pointed out with respect to the same arguments raised by TDS in its Comments,¹⁰ general speculations pertaining to the growth of the USF do not justify the imposition of any further delays in the processing of the Nextel Partners' Petition pending before the Commission. Nextel Partners' Alabama Petition was filed on April 4, 2003, and has already been awaiting decision far beyond the six-month processing deadline the Commission assigned to itself for consideration of competitive ETC petitions.¹¹ Existing law, including the Commission's most recent statement in the *Virginia Cellular Order*, requires Nextel Partners' Petition to be processed, and the Commission is bound to abide by *existing* rules and policies in all proceedings.¹²

⁹ See May 7, 2004 Comments of TDS Telecommunications Corp. at 2 and 10.

¹⁰ See Nextel Partners' Reply to Comments of TDS Telecommunications Corp. at 3-5, Section II.A.

¹¹ In the *Twelfth Report and Order* in Docket 96-45, the Commission committed to attempt to resolve ETC designation petitions in a six-month time frame, recognizing that "excessive delay in the designation of competing providers may hinder the development of competition and the availability of service in many high-cost areas." *Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved Areas and Underserved Areas, Including Tribal and Insular Areas*, Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 15 FCC Rcd 12208, 12264 (2000) ("*Twelfth Report and Order*").

¹² *CSRA Cablevision, Inc.*, 47 FCC 2d 572 at ¶ 6 (1974) ("Under the Administrative Procedure Act and the relevant judicial decision, the Commission is bound to follow its existing rules until they have been amended pursuant to the procedures specified by that act."). The Commission's *Virginia Cellular Order* establishes an interim framework that allows the Commission to move to decision immediately on pending ETC applications, subject to possible modification in future rulemakings. See *Virginia Cellular Order* at ¶ 12. Also see the discussion responding to TDS' Comments in Nextel Partners Reply to Comments of TDS Telecommunications Corp., filed May 14, 2004 at 3-5, Section II.A.

B. Grant of ETC Status for Nextel Partners in Alabama is in the Public Interest as Defined in the Commission’s *Virginia Cellular Order*

1. Nextel Partners Has a Unique Business Focus That is Compatible with the Goals of the Universal Service

The USF is not only intended to bring local phone service to consumers in rural, high cost and insular areas, but it is also intended to ensure that these consumers have

access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.¹³

Under the Commission’s Universal Service policies, consumers residing in high cost areas and low income consumers in the State of Alabama should be afforded the same opportunities as other consumers to choose a telecommunications carrier. In particular, the *Virginia Cellular Order* made clear that citizens in rural areas are entitled to have the opportunity to access new technologies, realize the benefits of mobility and access to wireless emergency services and select from a menu of innovative services.¹⁴ The record in this proceeding clearly demonstrates that Nextel Partners’ designation as an ETC will bring these telecommunications benefits to Alabama telecommunications users in rural, high cost and insular areas.

¹³ 47 U.S.C. § 254(b)(3).

¹⁴ See *Virginia Cellular Order* at ¶¶ 12 and 29 and Separate Statement of Chairman Michael K. Powell at ¶ 1 (“we recognize the unique value that mobile services provide to rural consumers by giving added substance to the public interest standard by which we evaluate wireless eligible telecommunications carriers.”) See also *In the Matter of Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776 at ¶¶ 4, 21 (1997). See also *Application of WWC Texas RSA Limited Partnership for Designation as an Eligible Telecommunications Carrier Pursuant to 47 U.S.C. § 214 (e) and PUC SUBST. R. 26.418*, PUC Docket Nos. 22289 and 22295, SOAH Docket Nos. 473-00-1167 and 473-00-1168 at 2 (Texas Public Utility Commission, October 30, 2000).

Nextel Partners' predominant business focus is to bring competitive state-of-the-art digital mobile telecommunications services to citizens living in secondary and rural markets. And in doing so, Nextel Partners provides these citizens access to the same nationwide Nextel system that is operated by Nextel Communications, Inc. in the primary U.S. markets. In particular, Nextel Partners adds the element of *mobility* to the provision of USF supported services -- a valuable option that the landline RTCs cannot match. This essential difference is particularly beneficial to consumers in rural areas, including remote roads and highways, where wireline telephones are more widely-spaced than in concentrated urban areas. As the Commission emphasizes in the *Virginia Cellular Order*:

. . . the mobility of telecommunications assists consumers in rural areas who often must drive significant distances to places of employment, stores, schools, and other critical community locations. In addition, the availability of a wireless universal service offering provides access to emergency services that can mitigate the unique risks of geographic isolation associated with living in rural communities.¹⁵

Nextel Partners also provides a larger local calling area than the RTCs, the acknowledged benefits of mobile telephony service and, where requested by the PSAP, GPS location assistance for customers calling 911.¹⁶ These benefits will be expanded and made available to more rural customers in Alabama as a result of Nextel Partners' ETC designation.

¹⁵ *Virginia Cellular Order* at ¶ 29.

¹⁶ Nextel Partners' Petition at 7; March 24 Supplement at 7, § 7 ("Public Interest") and Exhibit 3 ("Local Calling Area Maps for Alabama").

2. The Commitments Made by Nextel Partners in its March 24, 2004 Supplement Satisfy the Requirements of the Commission's *Virginia Cellular Order*

ARLEC claims that "Nextel has only minimally supplemented its Petition,"¹⁷ but does not point out any relevant deficiencies.¹⁸ In fact, Nextel Partners' Petition and Supplement contained significant commitments to Alabama and its residents, consistent with the specific framework enunciated in the Commission's *Virginia Cellular Order*.¹⁹

3. ARLEC's Assertions of Harm to the Public Lack Merit

Despite the clear benefits to the Alabama public set forth above, and despite Nextel Partners' commitments in its Petition as supplemented, ARLEC nevertheless argues that grant of Nextel Partners' Petition will cause undue harm. For example, ARLEC asserts that, if Nextel Partners' Petition is granted, certain Alabama RTCs would

¹⁷ See ARLEC Reply Comments at 5.

¹⁸ Instead, ARLEC cites in a footnote to issues raised by TDS Telecom in its March 7, 2004 Comments in this proceeding. See ARLEC Comments at 5 n.23, citing TDS Comments at 7-10. To the extent ARLEC wishes to reiterate those comments, Nextel's reply to them is contained in Nextel's May 14, 2004 Reply Comments to TDS' filing. See Nextel Partners' Reply to Comments of TDS Telecommunications Corp., filed May 14, 2004, at 7-13, Section II.C.

¹⁹ Nextel Partners' specific commitments include: (i) adoption of the CTIA Consumer Code (Supplement at 2); (ii) annual consumer complaint reporting per 1000 handsets (*id.* at 3); (iii) commitments for service provisioning within designated areas, and a detailed methodology for serving customers requesting service that are within the designated areas but not within existing coverage at the time of their requests (*id.* at 4); (iv) specific construction plans for improving service to designated areas and reaching out into unserved portions of the designated service territory (*id.* at 5-6 and Exhibit 2); (v) annual progress reports on use of USF monies (*id.* at 6); (vi) advertising commitments, including the local publicizing of Lifeline and Linkup programs for low-income consumers (*id.* at 7); (vii) wireless access for customers in situations where they do not have access to a landline telephone (*id.* at 7-8); (viii) wireless access to emergency services, especially beneficial to consumers in remote geographic areas (*id.* at 8); (ix) local calling areas that are far larger than any offered by the rural ILECs operating within Nextel Partners' Designated Areas (*id.* at 8 and Exhibit 3). Accordingly, ARLEC's challenge to the sufficiency of Nextel Partners' Supplement lacks merit and should be rejected by the Commission.

have from two to five “potential competitive ETCs” in their service areas.²⁰ ARLEC claims that allowing multiple ETCs in RTC study areas would draw millions of dollars annually from the USF, and that a stricter public interest test should be applied “where the economies of scale in a study area do not support multiple competitive entrants.”²¹

ARLEC’s claim concerning the adverse effect of multiple competitive ETCs in Alabama RTC study areas is unsupported and lacks merit. As an initial matter, ARLEC’s representations about the potential adverse effect of granting multiple competitive ETCs in Alabama RTC study areas are based on a speculative scenario in which *all* of the pending ETC petitions are granted for *all* requested study areas. However, speculation concerning what *might* happen cannot form the basis for present action by the Commission. The Commission’s *Virginia Cellular Order* stresses that the public interest test it outlines is a “fact-specific exercise.”²² Consistent with that approach, the impact of the grant of any particular ETC petition is considered on a case-by-case basis, on the record of that proceeding, and not on predictions of the future.

Further, even if ARLEC’s speculative scenario were to be actualized, and all pending ETC applications were granted for every study area, ARLEC *still* has not presented any evidence or persuasive argumentation that the grant of multiple providers in *any* Alabama RTC study area pertinent to Nextel Partners’ Petition would be detrimental to the public interest. ARLEC seems to claim that the addition of each new

²⁰ *Id.* at 3-4. Nextel Partners notes that two of the RTCs listed by ARLEC as having the “potential” for multiple ETCs in their study areas, GTC, Inc. and Gulf Telephone Company, are *not* RTCs in whose study areas Nextel Partners seeks designation. ARLEC’s representations concerning them are irrelevant to this proceeding.

²¹ ARLEC Reply Comments at 4.

²² See *Virginia Cellular Order* at ¶ 28.

competitive ETC in a given RTC study area substantially increases the “draw” on the USF. However, this conclusion is an unsupported assumption. In fact, it is far more reasonable to conclude that each successive wireless ETC that is added to a RTC study area merely increases the competition for *the same* customers and lines, rather than “creating” new customers and lines that must be subsidized. Since very few persons carry two or more wireless phones from different providers, even in urban areas, it is not obvious that if Nextel Partners enters a RTC study area in which another wireless ETC is operating, there will be a net increase in the number of supported lines merely by virtue of the fact that there is an additional ETC in the RTC study area.²³ A given customer will normally either choose Nextel Partners or another carrier for its wireless provider, but not *both*.²⁴

In fact, the designation of Nextel Partners as an ETC will give rural consumers in 5 RTC study areas real competitive choice *for the first time* in USF-supported services.

²³ Although it is possible that, with the entry of a new wireless ETC provider in a given RTC study area, customers that do not currently have wireless service might obtain it, these are still *the same* customers and lines that the existing wireless ETC seeks to serve. Accordingly, the new entrant is not likely to change the ultimate level of USF support paid out in the RTC study area appreciably, since the potential for those new customers to gain wireless USF-supported services already existed – with the existing wireless carrier – even before the new entrant gained ETC status in the RTC study area.

²⁴ In addition, ARLEC’s stated concerns about overloading the RTC study areas with competitive ETCs if Nextel Partners’ Petition is granted bears little, if any, resemblance to the *actual status* of competitive ETC penetration in Alabama RTC study areas. An examination of the Universal Service Administrative Company’s (“USAC”) Schedule HC03, entitled “Rural Study Areas with Competition 3Q2004 reveals that, as of the Third Quarter of this year, *only one* Alabama RTC – Millry Telephone Company (“Millry”) --has more than one competitive ETC in its study area. When considering only those RTC study areas in which Nextel Partners seeks designation, 5 of 12 have NO competition for the provision of USF-supported services (Butler, Graceba, Union Springs, Castleberry and Mon-Cre)²⁴ and 6 of the other 7 (Hayneville, Moundville, Frontier-South, Frontier-Lamar, Frontier-Alabama and Pine Belt) have only one competitive ETC offering USF-supported services in competition with the incumbent landline provider. This scenario in no way justifies denial of Nextel Partners’ Petition.

As for the RTC study areas that already have one competitive ETC, the addition of Nextel Partners as a *second* competitive ETC will enhance consumer choice, and bring the full benefits of Nextel Partners' seamless nationwide telecommunications network to more Alabama citizens.²⁵ Contrary to the views expressed by ARLEC, affording the rural consumer a choice of multiple competitive ETCs is clearly beneficial to the public interest, and does not cause any cognizable harm. This benefit was recently recognized by the Washington Utilities and Transportation Commission ("WUTC") in an order that designated its fifth wireless ETC. The WUTC observed:

We give significant weight to Staff's observation that in the four years since wireless carriers have been designated as ETCs in areas served by Rural ILECS, no Rural ILEC has requested an increase to its revenue requirement. No customer of a Rural ILEC has complained to the Commission that the designation of a wireless carrier as an additional ETC has caused harm. In comparison, rural ILECs' bare assertions of potential harm, unsupported by facts, are unavailing.

* * * * *

We disagree with Rural ILECs, at this time, that too many ETCs in rural areas runs counter to the public interest. The Commission believes that the public interest is better served by multiple ETCs. By competing with Rural ILECs, and other ETCs, ETCs will have to offer their services at a competitive price with a high level of quality to make customers choose—and continue subscribing to—their services.²⁶

Consistent with the WUTC's assessment, grant of ETC status to Nextel Partners should materially benefit consumers in all of the Alabama RTC study areas in which

²⁵ Nextel Partners would be the third competitive ETC approved for Millry's study area, but ARLEC has not presented any evidence that this will result in any cognizable harm for Millry, its subscribers, or for the USF. In fact, USAC data from Schedule HC03 (*see* n. 24 hereof, *supra*) indicates that *many* RTC study areas throughout the United States have *four* or more competitive ETCs, and there is no evidence that this has caused any harm to the public. (See, e.g., RTC SAC 351096 – 4 competitors; 351101 – 8 competitors; 351106 – 10 competitors; also SACs 44163, 522408, 330841, etc.)

²⁶ *In the Matter of the Petition of AT&T Wireless PCS of Cleveland, LLC et al.*, Wash. Utils. & Trans. Comm'n Docket No. UT-043011, Order Granting Petition for Designation as an Eligible Telecommunications Carrier at 11, 14 (Apr. 13, 2004).

Nextel Partners is seeking designation. None of those RTC study areas has a competitive ETC in operation that can match Nextel Partners' nationwide scope, or the unique features of Nextel Partners' network, such as nationwide Push to Talk.²⁷

II. CONCLUSION

Because all applicable legal and public interest requirements have been met, Nextel Partners requests that the Commission promptly grant Nextel Partners' Petition for Designation as an Eligible Telecommunications Carrier in the State of Alabama.

Respectfully submitted,

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²⁷ ARLEC's argument that multiple ETCs should not be allowed to operate in a RTC study area, because the entry of additional competitors in sparsely populated areas raises the average cost of service provision is also without merit. Not enough is known about the assumptions underlying the data assembled by ARLEC. However, even taking these representations at face value, the data do not take into account the existing situation where the landline network is already built out, and forming part of a subsidized rate base for a monopoly carrier.